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PP

v.

LEE KIM SENG

B

HIGH COURT SABAH & SARAWAK, MIRI
STEPHEN CHUNG J
[CRIMINAL TRIAL NO: 45-1-2011-(MR)]
29 JUNE 2012

C ***EVIDENCE:*** *Circumstantial evidence - Murder - Whether prosecution's evidence irresistibly point to accused as having caused deceased's death - Whether prosecution called material witnesses to explain discrepancies or gaps in evidence - Whether much of evidence prosecution sought to rely on to prove accused's guilt inadmissible*

D

The accused was charged in the High Court with murdering a teenage girl. The prosecution's evidence against him was wholly circumstantial. The girl had been strangled to death and her body was found lying face down in a grass-filled drain. A black plastic bag was wrapped around her head and tied at her neck. The girl's father testified that when he and his family members were at the police station to seek help on his daughter's disappearance they noticed the accused was also there with his parents. When they saw a police party leaving the station with the accused, they followed and ended up at the place where the girl's body was found. The prosecution relied on the following to establish the accused had killed the deceased: (i) alleged admissions by the accused's father to the police that the accused had told him he might have killed a female; (ii) evidence of a police officer ('PW13') that the accused had purportedly confessed to him that he had murdered a woman unintentionally and that he could show the police the place where it happened; (iii) evidence of another police officer ('PW14') that the accused allegedly told him he had thrown the girl's body at the place where it was found; and (iv) a report ('P81') prepared by the computer crimes section of the police forensics laboratory containing data retrieved from four mobile phones and their Subscriber Identification Module ('SIM') cards which were seized from the accused, his girlfriend and the deceased's boyfriend. The prosecution claimed what was contained in P81 showed the accused's motive for killing the deceased. The defence objected to the admissibility of all the pieces of evidence in (i) to (iv).

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Held (acquitting and discharging accused):

(1) There were too many gaps in the evidence presented by the prosecution. Although the accused knew where the deceased's body could be found and led police to it, on the facts and circumstances of the case, the evidence presented did not irresistibly point to one and only one conclusion *ie*, the guilt of the accused in causing her death. The prosecution failed to make out a *prima facie* case against the accused on the charge. (para 87)

(2) As the evidence relied on by the prosecution (with regard to the alleged admissions made by the accused's father, the evidence of PW13 and PW14 and exh. P81) were not admissible, there was no evidence that it was the accused who had strangled the deceased or was responsible for her death. (para 80)

(3) The conduct of the accused in purportedly telling his father he had done something wrong and in purportedly sending SMS messages on the incident to his girlfriend raised a lot of suspicion that he was or might have been responsible for the deceased's death. However, his father denied the accused had made any admission that he caused the death of a female and the prosecution chose not to call the accused's girlfriend to testify on the SMS messages referred to. (para 87)

(4) The accused's DNA was not found on the deceased's body or on her clothes or at the place where her body was found. His DNA was also not found on the black plastic bag that was tied around her head. No bloodstain from the deceased was found in the car usually used by the accused. (paras 84-86)

(5) Exhibit P81 was inadmissible as the prosecution had not satisfied the requirements of s. 90A of the Evidence Act 1950. *Inter alia*, the prosecution did not tender any certificate under s. 90A to prove P81 was produced by a computer in the course of its ordinary use. Neither did PW11 testify to that effect. With the contents of P81 being inadmissible, there was no evidence of any motive on the accused's part to kill the deceased. (paras 72-74 & 81)

(6) There was no evidence who was the last person who was with the deceased before she died. The accused was said to have gone out with the deceased to meet one Lee Yunn Mei. But the prosecution did not call Lee Yunn Mei to testify. (para 83)

(7) The accused was in effect under arrest or constructive arrest during the interview at the police station. No caution was administered to him by PW13 or by PW14. Therefore what the accused told PW13 during the interview that he had murdered a lady unintentionally and that he could show police the place where it happened were not admissible in evidence. PW14's testimony that PW13 told him the accused had confessed to killing a lady unintentionally and could show police the place where it happened was similarly inadmissible. The testimonies of PW13 and PW14 that the accused said he could show them the place where the girl's body had been thrown were also inadmissible in evidence. (paras 42-44 & 58)

Case(s) referred to:

Ahmad Najib Aris v. PP [2009] 2 CLJ 800 FC ***(refd)***
Amathevelli P Ramasamy v. PP [2009] 3 CLJ 109 FC ***(refd)***
Anandagoda v. Regina [1962] 1 LNS 7 PC ***(refd)***
Chan Chwen Kong v. PP [1962] 1 LNS 22 HC ***(refd)***
Chong Soon Koy v. PP [1977] 1 LNS 20 FC ***(refd)***
Dato' Mokhtar Hashim & Anor v. PP [1983] 2 CLJ 10; [1983] CLJ (Rep) 101 FC ***(refd)***
Goi Ching Ang v. PP [1999] 1 CLJ 829 FC ***(refd)***
Hasamuddin Talena v. PP [2002] 2 CLJ 504 CA ***(refd)***
Idris v. PP [1960] 1 LNS 40 HC ***(refd)***
Krishna Rao Gurumurthi v. PP and Another Appeal [2009] 2 CLJ 603 FC ***(refd)***
Krishnan Ramar v. PP [1987] 1 CLJ 28; [1987] CLJ (Rep) 145 SC ***(refd)***
Liew Kon Kiow (f) v. PP [1948] 1 LNS 137 CA ***(refd)***
Lim Hean Chong v. PP [2012] 2 CLJ 1046 CA ***(refd)***
Looi Kow Chai & Anor v. PP [2003] 1 CLJ 734 CA ***(refd)***
Pang Chee Meng v. PP [1992] 1 CLJ 39; [1992] 1 CLJ (Rep) 265 SC ***(refd)***
PP v. Basri Salihin [1993] 1 CLJ 420 HC ***(refd)***
PP v. Kang Ho Soh [1991] 3 CLJ 2914; [1991] 3 CLJ (Rep) 557 HC ***(refd)***
PP v. Rosyatimah Neza & Anor [1989] 1 CLJ 481; [1989] 2 CLJ (Rep) 364 HC ***(refd)***
Sulaiman Hamat v. PP [2012] 1 LNS 259 CA ***(refd)***

Sum Kum Seng v. PP [1981] 1 LNS 76 FC ***(refd)***
The King v. Cooray [1926] 28 NLR 74 ***(refd)***
The Queen v. Murugan Ramasamy [1965] AC 1 ***(refd)***
Wai Chan Leong v. PP [1989] 2 CLJ 1168; [1989] 1 CLJ (Rep) 171 SC ***(refd)***

Legislation referred to:
Criminal Procedure Code, ss. 112, 113(1), (4)
Evidence Act 1950, ss. 3, 17(1), (2), (3), 24, 25, 26, 27, 32(1)(a), (i), (j), 90A
Penal Code, s. 302

For the prosecution - Mahadhir Mohd Khairudin (Mohd Syakil Zulkifli with him); DPPs
For the accused - Ranbir Singh (Arthur Lee with him); M/s Ranbir S Sangha Advocates
M/s Arthur CA Lee & Partners Advocates

Reported by Ashok Kumar

JUDGMENT

Stephen Chung J:

[1] The accused was charged under s. 302 of the Penal Code as follows:

> Bahawa kamu, pada 24.3.2011 di antara jam lebih kurang 2 petang hingga 5 petang di Jalan Kpg. Beraya Lama, di dalam Daerah Miri, di dalam Negeri Sarawak, telah melakukan pembunuhan dengan menyebabkan kematian Tiffany Wong Ye Hui (P) No. (KPT: 930518-13-6086) dan dengan yang demikian telah melakukan suatu kesalahan yang boleh dihukum di bawah s. 302 Kanun Keseksaan.

[2] The duty of a judge sitting alone, at the close of the case for the prosecution, is to determine, as a trier of fact, whether the prosecution has made out a *prima facie* case against the accused. He must subject the evidence of the prosecution to a maximum evaluation: *Looi Kow Chai & Anor v. PP* [2003] 1 CLJ 734.

[3] According to the post mortem report, the cause of death was manual strangulation of the deceased. The prosecution in its opening statement submitted that it would rely on medical and

circumstantial evidence and on s. 27 of the Evidence Act to prove that it was the accused who caused the death of the deceased. The burden was on the prosecution to prove that the deceased died on 24 March 2011 and that she died as a result of being strangled to death by the accused.

[4] PW2, the mother of the deceased, testified that on 24 March 2011 at about 11am someone came to pick up the deceased. She said the deceased left the house with this person in a grey colour motor vehicle which she thought was a grey Proton Waja. She could not see the driver and she did not know who came to pick up the deceased. She said she told the deceased to come home early and that she telephoned the deceased many times from 5pm onwards but the deceased did not answer her calls.

[5] When the deceased did not come home late that night and still did not answer her calls, she became worried. She talked to her husband (PW4) and one of her sons (PW9). She said her sons called the deceased's friends via their mobile phones and facebook accounts to find out where she was and they also went out looking for her around the city but could not find her. PW2 said the deceased did not come home that night. She said that early the next morning PW4 and PW9 went to lodge a police report but the police advised them that a person must be missing for at least 24 hours before a missing person report could be lodged.

[6] PW4 testified that the deceased used the DIGI network for her mobile phone and that through their contacts in DIGI they were able to find out that the deceased had called or talked to two persons the night before. They made enquiries with the deceased's friends and found out that one of the persons whom the deceased talked to via her mobile phone was the deceased's boyfriend (PW5) and that the other person was called Lee Kim Seng ie, the accused. PW4 said that they found out from the deceased's friends that the accused father owned a goldsmith shop and they went to the shop but it was not opened. Then they went to the accused's house but nobody opened the gate when they pressed the doorbell and sounded their car horn.

[7] PW4 said that he and his son went back to the police station to seek help. They met two politicians, Dato Sebastian Ting and Mr Andy Chia, who happened to be at the police station and who tried to help by getting the police to assist them as soon as possible. PW4 said that the officer who was to see them was not available and they waited at the police station. He said that at about noon he saw the accused and his parents were also at the police station. They were with an Inspector Chong in a room. The door was not closed but they were prevented from going into the room. He did not know why they were there. He said that they were asked to wait in another room used by another officer. He said that Dato Sebastian Ting then told him that something bad had happened to his daughter but he was not told what exactly had happened to her daughter. He said he assumed the worst had happened.

[8] He said that at about 2pm he saw the police and the accused left the police station presumably to go to the scene. They followed the police party to the scene where he saw a body lying in a drain and he knew it was her daughter. PW4 identified the deceased as his daughter at the post mortem at the hospital. He and his wife also identified the deceased as their daughter from photographs shown to them in court during the trial.

[9] The post mortem, which was carried out on 27 March 2011 at 12.30am, was performed by Dr Siew Sheue Feng (PW12), a forensic pathologist from the Department of Forensic Medicine, Kuala Lumpur Hospital. After the post mortem he prepared a report which was tendered as exh. P63.

[10] PW12 said that the deceased sustained external and internal injuries which resulted in her death. The external injuries included a group of four injuries on the neck comprising of (a) a bruise, 6 x 3cm just beneath the left angle of mandible, (b) a bruise, 4.2 x 4cm on the left lateral aspect of the neck, (c) a group of 4 obliquely arranged abraded bruises measuring 1.2 x 0.4cm, 1 x 0.6cm, 2 x 0.5cm and 0.8 x 0.5cm respectively on the front of the neck, below the thyroid cartilage, and (d) an abrasion, 5 x 1cm on the root of the right front of the neck. The corresponding internal injuries included a subcutaneous contusion 7 x 5cm on the front of the neck, above the suprasternal notch, contusion of the left sternothyroid and contusion of the left thyrohyoid muscle,

membrane and left lateral thyrohyoid ligament and haemorrhage was noted on the front of the right half of the epiglottis. He said that there was no evidence of sexual assault on the deceased.

[11] PW12 said the injuries were consistent with those due to manual strangulation. He was asked and he said he was not able to determine whether the deceased was strangled inside a motor vehicle, in particular whether she was strangled inside a Toyota Vios motor vehicle which was usually used by the accused and shown in the photographs in exh. P3. He was also not able to come to a finding on the time of death of the deceased.

[12] PW5 was the deceased's boyfriend. He testified that on 24 March 2011 at 3pm he just came back from school. Then he saw an sms message from the deceased that the deceased had gone out with the accused to meet her friend Lee Yunn Mei at Boulevard to pick up her examination results from Lee Yunn Mei. He replied to her message that it was okay for her to go and the deceased replied 'okay'. That was the last time he heard from her. PW5 called the deceased after 6pm but she did not answer. He called again after 9pm and again she did not answer. He went out looking for her later but did not find her.

[13] There was no eyewitness or any direct evidence to establish that it was the accused who strangled the deceased to death. The prosecution relied on the following evidence to establish that it was the accused who was responsible for the death of the deceased:

(a) The admissions by the father (PW15) of the accused who purportedly told the police what the accused had said to him that the accused might have killed a female.

(b) The evidence of PW13, the police officer who interviewed the accused at the police station on 25 March 2011 and whom PW4 had referred to as Inspector Chong, who testified that the accused during the interview had confessed to him that the accused had murdered a lady unintentionally and that the accused could show the police the place where it happened.

(c) The evidence of PW14, the police officer, who together with PW13 and other police officers, were led by the accused to a drain at Bakam where the deceased's body was found and who testified that the accused had told him that the accused had thrown the body at the site.

(d) The evidence of PW11, the police officer who examined and analysed four mobile phones which were seized from the accused, from PW5 and from a Kuan Hui Chin. PW11 extracted the sms messages from the mobile phones which PW17 said showed the motive of the accused to kill the deceased.

The defence objected to the admissibility of the above evidence. I shall deal with each of the above evidence, the objections to their admissibility and on their admissibility or otherwise.

[14] What is circumstantial evidence? It consists of this: that when you look at all the surrounding circumstances, you find a series of undesigned, unexpected coincidences that, as a reasonable person, you find your judgment is compelled to one conclusion. If the circumstantial evidence is such as to fall short of that standard, if it does not satisfy that test, if it leaves gaps then it is of no use at all: *Idris v. PP* [1960] 1 LNS 40. Where the evidence is wholly circumstantial what has to be considered is not only the strength of each individual strand of evidence but also the combined strength of these strands when twisted together to make a rope. Is that rope strong enough to hand the accused: *Chan Chwen Kong v. PP* [1962] 1 LNS 22. Where circumstantial evidence is the basis of the prosecution's case the evidence proved must irresistibly point to one and only one conclusion, the guilt of the accused: *Dato' Mokhtar Hashim & Anor v. PP* [1983] 2 CLJ 10; [1983] CLJ (Rep) 101.

[15] PW17, the investigation officer of the case, testified that on 25 March 2011, at about 11.30am, when he was in Kuching, he received a telephone call from a male person by the name of Lee Ket Chung (PW15). He said that PW15 informed him that his son had a problem, a high possibility that he might have killed a female person. PW17 told PW15 that he was in Kuching and he told PW15 to see PW13 or PW14 for further action to be taken. He said that he immediately informed his superior DSP Nixon of the conversation with PW15 and he also informed PW13 and PW14 that PW15 would contact them.

[16] He said that he subsequently telephoned PW13 and PW14 to find out whether PW15 had contacted them and PW13 told him that PW15 and the accused were in the police station. He said that after he arrived in Miri he telephoned PW14 who told

him that they ie, the police party and the accused were in Kampung Beraya Lama and he went to the place. When he arrived at the place, he met PW14 and PW13 who briefed him on what had happened and he saw a person whom he suspected was the accused. After that he saw a body in a drain. He found out that it was a female.

[17] PW13 testified that on 25 March 2011 at about 2pm, the accused was brought by his father (PW15) to see him. He said PW15 informed him that the accused had committed a big offence and that the accused probably had committed a murder to a girl. PW13 said that PW15 asked him to take action and he interviewed the accused. He said the accused told him that the accused had murdered a lady unintentionally and that the accused could show the place where it happened. He said the accused told him that the accused did not know the name of the place but the accused could show him where the place was.

[18] He said the accused led him together with PW14 and other police officers to the scene which was about 1 km, via a small road of Kpg Beraya Lama, from the main road of Bakam. He said that upon arrival they did not see the body because the place was bushy with long grass. He said that after the accused was taken out of the police vehicle, the accused showed them a drain which was covered with long grass where they found the body. The body was facing down in the drain. The body was covered with a little bit of water. The head of the body was covered and wrapped in a black plastic bag which was tied at the neck. PW13 said that the accused told him it was the body of the girl that had been thrown there. PW13 said that it was PW14 who untied and removed the black plastic bag which covered the head of the body. PW13 subsequently made a police report in connection with the interview and the information which he received from the accused. The police report was tendered as exh. P65.

[19] PW14 said that on 25 March 2011 at about 11am he was informed by PW13 that a male person had gone to the police station and made a confession that he had killed a female which was thrown at a place called Bakam, Miri. After that, he met PW13 in the office and this male person whom he identified as the accused was already in the office with PW13 and Lance Corporal Andrew. He said PW13 again told him about the interview with the accused.

[20] PW14 said that he again asked the accused whether it was true that the accused had killed a female and whether the accused could bring the police to show the location where the body was thrown. PW14 said that the accused told him the accused did not know the specific location but the accused could show the police where the location was. PW14 said that he then instructed L/Cpl Andrew to call other police personnel to be on standby to go to the location.

[21] PW15 denied having told PW17 in their telephone conversation that the accused had told PW15 that the accused might have caused the death of a female. PW15 similarly denied having told PW13 at the police station that the accused had told PW15 that the accused might have caused the death of a lady. In respect of the conversation or admission made by PW15 to PW17, PW17 said that immediately after his telephone conversation with PW15 on 25 March 2011 he informed his superior about the conversation. The evidence showed that PW17 did not write down or record the contents of this conversation with PW15. He also did not record the conversation in his diary or in the investigation diary in the case. The prosecution did not call the superior officer to whom PW17 had reported the telephone conversation to testify and corroborate PW17 on thecontents of the conversation.

[22] Similarly PW13 did not record the conversation about what PW15 had purportedly told him at the police station that the accused might have cause the death of a lady and requested him to take action. It is easy to make such an allegation and it is just as easy to deny having made such an admission.

[23] However, PW17 had recorded a statement from PW15 under s. 112 Criminal Procedure Code (CPC) which purportedly included what the accused had told PW15 regarding the death of the deceased. PW15 in fact admitted that he had given a statement to PW17. PW15 in his evidence however denied having told PW17 during their telephone conversation and during the recording of his statement that the accused had told him that the accused might have caused the death of the deceased. PW15 said that he could not read and write Bahasa Malaysia, he could only speak and understand simple pasar Malay. He said that during the recording of the statement PW17 spoke to him in Mandarin. He said that the statement which was recorded in Bahasa Malaysia was not shown or read back to him.

[24] Although this statement was shown to PW15, for him to refresh his memory, when PW15 denied having made the admission to PW13, it was not put to him that he had made the admissions to PW17 and or to PW13 in the statement. The statement was not tendered as an exhibit to prove the admissions made by PW15 to PW17 or to PW13 nor to contradict his denials. It was also not used to impeach his credibility as a prosecution witness on what he had told PW13 and PW17.

[25] No doubt PW15 is the father of the accused and he had every reason to try to protect his son. However, he had denied making the admissions to PW13 and or PW17, both of whom did not immediately record what PW15 had purportedly told them, and the prosecution chose not to tender his recorded statement to contradict him nor to impeach him during the prosecution's case. PW15 was testifying as a prosecution witness and what he had said in his evidence had contradicted the evidence of PW13 and PW17 on these allegations. Any benefits of the doubts must be given to the accused person.

[26] It was only at the end of the prosecution's case that the learned DPP applied to recall PW15 in order to impeach his credibility, not on the fact that he had made the purported admissions to PW17 and PW13, but that he had in fact made a police report (exh. P71) to PW16 which he had denied when asked about it during the trial. In the police report, PW15 say that his son might have committed a major offence involving a female. The report did not say that the accused had killed a female or the deceased. PW15 had subsequently denied making any such admission.

[27] The prosecution's application to recall PW15 for that purpose was disallowed because it was not put to PW15, when he was in the witness stand, that he had in fact made the police report to PW16. The police report was also never shown to PW15 when he denied making the police report while he was in the witness stand. PW16 was called as a witness to testify that PW15 had made the police report at the police station which report was recorded by him.

[28] The prosecution could submit on the credibility of PW15 by referring to the police report which had been tendered as an exhibit without the necessity of having to recall him just to impeach him as a witness on whether he made the police report or otherwise. That could not detract from the fact that PW15 had denied making the said admissions to PW17 and PW13. Although PW15's credibility was questionable the prosecution had not proven that he had made the admissions.

[29] Next, did the accused tell PW13 that he had murdered a lady unintentionally, that he could show the police the place where it happened and whether this amounted to a confession or an admission and whether it was admissible in evidence against the accused.

[30] The evidence showed that after PW15 had telephoned PW17 who asked him to contact either PW13 or PW14, PW15 and his wife had brought the accused to the police station to see PW13. PW13 after talking to PW15 had brought the accused to a room while he asked his parents to wait outside. PW13 had called for L/Cpl Andrew to be present in the room during his interview with the accused. PW13 had testified that during the interview the accused had told him that the accused might have murdered a lady unintentionally and that the accused could show the police where it happened.

[31] At that juncture, the learned defence counsel had objected to the admissibility of the above admission or confession on the basis that no caution was administered to the accused. The learned DPP replied that the prosecution did not wish to admit or use the admission or confession under s. 112 CPC but under s. 27 of the Evidence Act (EA). He then applied for a short stand down to discuss the matter with the other DPP who assisted him in the trial. After the short stand down, the prosecution informed the court that it did not intend to rely on the admission or confession made by the accused to PW13 that he 'had murdered a lady unintentionally' and informed the court that the same was not admissible as evidence. The prosecution submitted that it would rely on evidence which led to the discovery of the body under s. 27 EA.

[32] The prosecution had also agreed to delete the sentence 'saya telah bunuh satu perempuan secara tidak sengaja' from the police report P65 made by PW13. On the objection by the defence, the court had also deleted and held as not admissible under s. 27 EA the sentence in the police report 'Itu perempuan saya buang di dalam parit di Bakam.' The court ruled that the sentence in the report 'saya boleh tunjuk mana itu tempat' was admissible under s. 27 EA.

[33] Similarly, the defence submitted that what the accused had purportedly said to PW14 was inadmissible because the accused was in police custody and in effect under arrest and that no caution was administered to him before or during the interview. It was submitted that what the accused had purportedly said to PW14 was a confession and could not be used against him pursuant to s. 113 CPC.

[34] On the other hand, the prosecution submitted that the accused was not under arrest during the interview but was voluntarily brought to the police station by his parents. It was submitted that the accused was only arrested after he had led the police to the place where the body of the deceased was discovered. The prosecution submitted that what the accused had said to PW13 and or to PW14 were admissible pursuant to s. 17 EA.

[35] Section 17 reads as follows:

(a) An admission is a statement, oral or documentary, which suggests any inference as to any fact in issue or relevant fact, and which is made by any of the persons and under the circumstances hereinafter mentioned.

(b) A confession is an admission made at any time by a person accused of an offence, stating or suggesting the inference that he committed that offence.

(c) Subsection (2) shall have no application in Sarawak.

[36] In *Anandagoda v. Regina* [1962] 1 LNS 7, the Privy Council accepted as correct the view taken by Garvin ACJ in *The King v. Cooray* [1926] 28 NLR 74 in explaining what amounted to a confession under s. 17 as follows: "The term 'admission' is the genus of which 'confession' is the species. It is not every

statement which suggests any inference as to any fact in issue or relevant fact which is a confession, but only a statement made by a person accused of an offence whereby he states that he committed that offence or which suggests not any inference but the inference that he committed that offence." The Privy Council held that the test whether a statement is a confession is an objective one, whether to the mind of a reasonable person reading the statement at the time and in the circumstance in which it was made it can be said to amount to a statement that the accused committed the offence or which suggested the inference that he committed the offence. The statement must be looked at as a whole and it must be considered on its own terms without reference to extrinsic facts.

[37] This judgment must be read in the light of the comments made in *Liew Kon Kiow (f) v. PP* [1948] 1 LNS 137 regarding English, Indian or for that matter Ceylon (as it was then called) authorities on s. 17 EA. In that case, the Court of Appeal said that it is quite clear from the words "or suggesting the inference" that something short of a full admission of guilt by the accused may yet be a "confession" within the definition of s. 17(2). In that case, it was held that the statement given by the accused to the police was a confession and being made while he was in the custody of the police, it was inadmissible in evidence.

[38] Section 17(3) provides that sub-s. (2) shall have no application in Sarawak. This means that only s. 17(1) EA applies in Sarawak and that the distinction between an admission and a confession as explained in *Anandagoda v. Regina* shall not apply in Sarawak. Therefore, an oral statement made by a person as to any fact in issue may be admissible in evidence. Whether it is admissible will depend on the facts and circumstances of the particular case. As provided for in s. 17(1), the words "made by any of the persons and under the circumstances hereinafter mentioned" require that it should be read together with the other sections subsequent to s. 17, in particular the provisions of s. 24, s. 25 and s. 26 in a criminal trial.

[39] The question whether the accused was at the material time under arrest is a question of fact. A person is under arrest if he is being watched or guarded or restrained to prevent his escape or if he is not at liberty to leave the room in the police station where

A he is being interviewed: see *PP v. Rosyatimah Neza & Anor* [1989] 1 CLJ 481; [1989] 2 CLJ (Rep) 364, *PP v. Kang Ho Soh* [1991] 3 CLJ 2914; [1991] 3 CLJ (Rep) 557.

[40] The evidence showed that the accused was handcuffed B when he was brought from the room by PW13 and PW14 to the police vehicles in order to go to Kg Beraya Lama to find the body of the deceased. PW14 said that the accused's hands were handcuffed in front of him when he was taken from the room to the police vehicle. He said that when the accused was placed C under arrest at Kg Beraya Lama, his hands were then handcuffed behind him. The defence disputed this fact and tendered a copy of the Sin Chew Daily newspaper (exh. D1) showing a photograph taken at the place where the body of the deceased was recovered. The photograph showed that the hands of the D accused were handcuffed behind his back. Be that as it may, there was no caption or any report in the newspaper to indicate the precise time that it was taken and whether the photograph was taken before or after his arrest at the scene.

E **[41]** However, PW15 had testified that when the accused was brought from the room to the police vehicle by a group of police, the accused's hands were handcuffed behind him and the accused had shouted out to PW15 that PW13 had threatened to use electric shock against the accused during the interview. As stated F earlier, PW15 testified as a prosecution witness and what he had said had contradicted the testimony of PW13 and PW14. The prosecution chose not to call L/Cpl Andrew, who was present in the room with PW13 during the interview and who was in the police party to go to Bakam to either corroborate PW13 and PW14 or contradict PW15. In any event, PW9 had testified that G the accused hands were handcuffed behind his back when he was brought from the room to the police vehicles.

[42] From the above facts and circumstances, it was obvious that the accused was already in police custody notwithstanding that he H was brought to the police station by his parents. The accused was, from the moment he was brought inside the room to be interviewed by PW13 in the presence of L/Cpl Andrew and after his parents were asked to leave the room, no longer at liberty to leave or do what he liked bearing in mind that the parents of the I deceased had already told the police that their daughter was

missing and PW13 had said that PW15 had purportedly told him that the accused might have caused the death of a female. The accused was in effect under arrest or under constructive arrest during the interview.

[43] The evidence showed that no caution was administered to the accused by PW13, and by PW14 subsequently, before or during the interviews at the police station. Therefore what the accused had said to PW13 during the interview that he had murdered a lady unintentionally and that he could show the police the place where it happened were not admissible in evidence: see *Krishnan Ramar v. PP* [1987] 1 CLJ 28; [1987] CLJ (Rep) 145, *PP v. Rosyatimah Neza & Anor (supra)*. Further, s. 113(1) of the CPC, as amended, states that except as provided in the section, no statement made by any person to a police officer in the course of a police investigation (made under this chapter of the CPC) shall be used in evidence.

[44] Therefore, the testimony of PW14 on what PW13 had told him that the accused had admitted to PW13 that the accused had murdered a lady unintentionally and could show the police the place where it happened was similarly inadmissible.

[45] The next question is whether what the accused had said to PW14 that he could show the police the place where he had thrown the body of the deceased was admissible in evidence. The prosecution submitted that it was admissible under s. 27 EA whereas the defence submitted that it was not admissible. It was submitted that what the accused had said to PW14 was information obtained in the course of police investigation while the accused was in police custody and no caution was administered to him. It was also submitted that PW14 did not record what the accused had said to him and the same was not admissible.

[46] Section 27 EA reads as follows:

> When any fact is deposed to as discovered in consequence of information received from a person accused of any offence in the custody of a police officer, so much of that information, whether the information amounts to a confession or not, as relates distinctly to the fact thereby discovered may be proved.

[47] The Federal Court in *Sum Kum Seng v. PP* [1981] 1 LNS 76 explained s. 27 *vis-à-vis* ss. 24, 25 and 26 by adopting a passage from the judgment of the Privy Council in *The Queen v. Murugan Ramasamy* [1965] AC 1 which reads:

> There can be no doubt as to what is the general purpose of sections 25 and 26. It is to recognize the dangers of giving credence to self-incriminating statements made to policemen or made while in police custody, not necessarily because of suspicion that improper pressure may have been brought to bear for the purpose of securing convictions. Police authority itself, however carefully controlled, carries a menace to those brought suddenly under its shadow; and those two sections recognize and provide against the danger of such persons making incriminating confessions with the intention of placating authority and without regard to the truth of what they are saying.
>
> Section 27, on the contrary, envisages a situation in which circumstances themselves vouch for the truth of certain statements made by an accused person, even though they are made in conditions that would otherwise justify suspicion. These are those statements that have led to the actual discovery of a proven fact when the information supplied by the accused has been the cause of the discovery.

[48] It was decided in another Federal Court decision that the Malaysian courts had persistently held to the effect that s. 27 was not subject to s. 24 of the Evidence Act. Once the information was proved to be within the province of s. 27, the trial court would admit it in evidence notwithstanding that the information might not be given voluntarily. It went on to say that any departure from the entrenched judicial interpretation laid down in the long line of decisions should be left to the legislature: *Goi Ching Ang v. PP* [1999] 1 CLJ 829.

[49] Further, s. 113(4) of the CPC as amended provides that nothing in that section shall be deemed to apply to any statement made in the course of an identification parade or falling within s. 27 or ss. 32(1)(a), (i) and (j) of the Evidence Act.

[50] On the above authorities, an information obtained under s. 27 EA is admissible notwithstanding that it may not be given voluntarily. However, it is not the end of the matter. The courts on the facts and circumstances of the particular case have the discretion in the interest of justice and in fairness to exclude such information: see *Goi Ching Ang v. PP (supra)*, *Krishna Rao Gurumurthi v. PP and Another Appeal* [2009] 2 CLJ 603.

[51] Must the information obtained be recorded? Learned defence counsel referred to the case of *Hasamuddin Talena v. PP* [2002] 2 CLJ 504 which held that the information must be exact and recorded in the language or words used by the accused and must be proved. With respect, I am not able to agree. This case referred to the decision of the Federal Court in the case of *Pang Chee Meng v. PP* [1992] 1 CLJ 39; [1992] 1 CLJ (Rep) 265 where Abdul Hamid Omar LP said that in invoking s. 27, the courts should be very vigilant to ensure the credibility of evidence by the police personnel which is so vulnerable to abuse. *Pang Chee Meng v. PP* did not decide that the information or words used by the accused must be exact and recorded in the language or words used by the accused.

[52] Although the Federal Court in *Sum Kum Seng v. PP (supra)* said that common sense stressed the desirability that the actual words be recorded somewhere, it ruled that there is no strict necessity at law to give the actual words used by an accused person in supplying the information that led to the discovery of a fact or thing under s. 27. Another decision of the Federal Court in the case of *Amathevelli P Ramasamy v. PP* [2009] 3 CLJ 109 held that s. 27 did not require the question to be recorded before the information might be admitted.

[53] In this case, PW14 testified that he was informed by PW13 that a male person had gone to the police station and who made a confession to PW13. He said he then went to the office where PW13 together with L/Cpl Andrew and the accused were. He said PW13 again briefed him about the confession and he asked the accused whether it was true that the accused had killed a female and could the accused bring the police to the location where the body was thrown. PW14 said that the accused told them the accused did not know the name of the location but he could show the police the location. Subsequently, PW14 made a police report (exh. P69 and P69A) on the discovery of the body.

[54] As stated above, the defence objected to the admissibility of the above testimony of PW14 and to P69 and P69A. I have already ruled on the inadmissibility of the testimony of PW13 about what he told PW14 that the accused had confessed to killing a female. The prosecution had also put on record that it was not relying on the admissions made by the accused to PW13.

[55] During the trial, the learned DPP had also agreed to expunge the words 'Subjek mengesahkan perempuan berkenaan yang telah dibunuh olehnya dan dicampak ke dalam parit tersebut' from P69 and P69A after the learned counsel had objected to their admissibility. After the above words were expunged, the police report was tendered as P69 and P69A.

[56] Although PW14 did not record the information that led to the discovery of the body either immediately or as soon as possible, in the event that it is required to do so, notwithstanding what I have said in this judgment that it is not necessary, depending on the facts and circumstances of each case, I am of the view that the recording of the information in a police report will suffice: see *Krishna Rao Gurumurthi & Ors* [2000] 1 CLJ 446. The information must be such as has caused discovery of the fact. The fact discovered embraced the place from which the object ie, in this case the body of the deceased, was produced and the knowledge of the accused as to this and the information must relate distinctly to this fact: *Chong Soon Koy v. PP* [1977] 1 LNS 20, *Wai Chan Leong v. PP* [1989] 2 CLJ 1168; [1989] 1 CLJ (Rep) 171.

[57] The information received by PW14 under s. 27 was admissible. Now, what exactly was the information PW14 received? The question put by PW14 to the accused was whether it was true that the accused had killed a female and could he bring the police to the location where the body was thrown. The answer of the accused was that he did not know the name of the location but he could show the police the location. This was the information or answer given by the accused and which was admissible under s. 27 EA.

[58] It is to be noted that the accused did not say he threw the body at this location. This was in the question asked by PW14 but the accused did not specifically say that he threw the body there. The question put by PW14 to the accused was based on the briefing he received from PW13. It is to be noted that PW13 did not initially testify that the accused could show the police the place where the body was thrown. PW13 had in fact testified that the accused could show the police the place where it happened (see p. 143 NOP). It was only subsequently that PW13 had said

the accused could show him the place where the body was thrown (see p. 145 NOP). As stated above, the prosecution had applied to expunge the words 'Subjek mengesahkan perempuan berkenaan yang telah dibunuh olehnya dan dicampak ke dalam parit tersebut' from P69 and P69A. Therefore, the testimony of PW13 (at p. 145 NOP) and of PW14 that the accused could show them the place where the body was thrown were not admissible in evidence.

[59] The testimony of PW14 (line 32 at p. 167 NOP) 'I asked is this the female that you throw? And he replied 'yes' and of PW13 (at line 25 at p. 145 NOP) that the accused had said 'this is the body of the girl that has been thrown here' were not admissible under s. 27 EA because this was information or statements made after the discovery of the body: see *PP v. Basri Salihin* [1993] 1 CLJ 420, *Sulaiman Hamat v. PP* [2012] 1 LNS 259.

[60] The next issue is on the admissibility of the sms messages mined or retrieved from the four mobile phones seized during the police investigation. The prosecution submitted that the data retrieved from these phones showed that it was the accused who strangled the deceased and the data showed his reasons or motives to kill the deceased. Although the data retrieved from the phones and SIM cards were contained in a report tendered as exh. P81, the defence objected to the admissibility of the data or information retrieved from the phones.

[61] PW11 said that she received four mobile phones from PW17 for analysis at the Makmal Forensik PDRM Jenayah Komputer section, at Cheras, Selangor. The first phone was a Sony Ericsson (exh. P67A) which was inside a green plastic bag seized from the front right trouser pocket of the accused. PW11 said that she could not analyse the phone because it was locked. The second phone was a Nokia (exh. P68A), black in colour, which was seized from the front left trouser pocket of the accused. There was a bracelet with the name 'Hui Chin' attached to the top left side of this Nokia phone. The bracelet was tendered as exh. P68B. All these were seized from the accused by Cpl. Zainal on the instruction of PW14 at the site where the body was discovered. PW14 handed these to PW17 at CPS Miri on the same day.

[62] The third phone was another Nokia, also black in colour (exh. P78A) which was seized from Huan Hui Chin by PW17. He lodged a police report (P76) in respect of the seizure. PW17 also seized the fourth phone, which was a LG (exh. P79A), which was seized from PW5. PW17 lodged a police report (P77) in report of the seizure of the LG phone. PW11 also could not analyse this phone because the software used in the laboratory's XRY equipment was not able to analyse the LG phone. She was able to analyse the two Nokia phones P68A, P78A and their SIM (Subscriber Identification Module) cards and the SIM card of the LG phone. She prepared a report (exh. P80) together with the annexure (exh. P81) after her analysis.

[63] PW11 said that by using the XRY equipment and software she was able to retrieve the contacts, telephone calls and sms made to and from the phones which were stored in the two Nokia and their SIM cards and the SIM card of the LG. Lampiran A1 of exh. P81 was the data retrieved from the Nokia phone P68A, lampiran A2 was the data retrieved from the SIM card of this Nokia, lampiran B1 was the data retrieved from the second Nokia phone P78A, lampiran B2 was the data retrieved from the SIM card of this second Nokia and lampiran C1 was the data retrieved from the SIM card of the LG phone P79A.

[64] PW17 testified that P67A was registered in the deceased's name while P68A was registered in the accused name. PW17 said that he obtained the information on the phone registrations from the network carrier DIGI. The information from DIGI was marked as exh. P17.

[65] The information in P17 was provided by PW7 who was a senior working in the investigation department of DIGI. Upon request by PW17 she provided information for several mobile phone numbers under the DIGI network. PW17 showed that the phone numbers 0165257235 and 0165227235 were registered in the name of the accused and the phone number 0168724390 was registered in the name of the deceased.

[66] From her investigation, she testified that on 24 March 2011 there was no telephone call made between the numbers registered in the accused name and the phone number registered in the deceased's name. This would contradict the evidence of PW4 that the accused had talked to the deceased on 24 March 2011.

However, PW7 said the data showed that on 24 March 2011 there were many exchanges of sms messages between the numbers 0165257235 and 0168724390 between 10.26am and 11.45am. No evidence was given as to the contents of these messages.

[67] Although the phone number 0168724390 was registered in the name of the deceased, there was no evidence that the Sony Ericsson (P67A) belonged to the deceased except for the testimony of PW17. PW17 said that he obtained the information from DIGI. Exhibits P16, P17 and P18 did not in any way mention or refer to a Sony Ericsson phone registered in the name of the deceased. PW7 did not testify that the number 0168724390 was used on a Sony Ericsson or that the deceased was using a Sony Ericsson mobile phone or that P67A belonged to the deceased. She was not shown P67A.

[68] P67A was not shown to the deceased's father, mother or brother (PW4, PW2 and PW9) for identification whether it belonged to the deceased when they testified in court. It was also not shown to the deceased's boyfriend (PW5) nor to the deceased's friend (PW6) for their identification whether it belonged to the deceased. The phone was not sent for any DNA analysis to confirm that it might have been used or was in the possession of the deceased. PW11 was not able to analyse the phone and there was no confirmation that the Sony Ericsson belonged to the deceased. Therefore, there was no basis for PW17 to say that P67A was registered in the deceased's name or belonged to the deceased.

[69] Further, PW14 said that the phones P67A and P68A were seized by Cpl. Zainal on his instructions. PW14 testified that he handed these two phones to PW17 on 25 March 2011 at CPS Miri. However, PW17 testified that these two phones were handed to him by L/Cpl Hamzaima. PW17 did not lodge any police report on the seizure of these two phones but he said he recorded the seizures in his investigation diary. PW17 did not exhibit the diary and the prosecution did not clarify this discrepancy on the seizures of P67A and P68A.

[70] PW17 said that he investigated the contents of P80 and P81 and he found that the accused did send several sms messages to his girlfriend Kuan Hui Chin about the incident he committed. He referred to these messages in lampiran A1, A2 and B2

(see pp. 225-226 NOP). PW17 was referred to an entry ie, sms no. 4 at p. 8/9 of lampiran B2 dated 25 March 2011 at 4.51am He said that this sms was sent from the phone number +60165257235 which belonged to the accused. He was also referred to another entry ie, sms no. 2 at p. 8/13 of lampiran A1 dated 25 March 2011 at 4.51am and the phone number +60165227235. He said that this phone number was registered in the name of the accused but the phone was used by the accused girlfriend by the name of Kuan Hui Ching.

[71] The four mobile phones and the SIM cards were devices for recording, storing, processing, retrieving or producing information and were described as devices by PW11 in her report. They came within the definition of 'computer' under s. 3 EA and the data retrieved from these devices come within the definition of 'document' under the EA. The data was retrieved from the phones by using the XRY equipment and software which also came within the definition of a computer.

[72] The prosecution did not tender any certificate under s. 90A of EA to prove that the document P81 was produced by a computer in the course of its ordinary use bearing in mind that it tendered the s. 90A certificates when it tendered the photographs taken with the digital camera.

[73] PW11 did not testify that the document was produced by a computer in the course of its ordinary use. PW11 also did not testify that the computer referred to was in good working order and was operating properly in all respects throughout the material part of the period during which the document P81 was produced. PW11 did not say that the mobile phones or SIM cards or the XRY equipment and its software were in good working order and were operating properly in all respects throughout the material part during which P81 was produced. The evidence showed that she was not able to access or retrieve any data from the Sony Ericsson phone and that the software used in the XRY equipment was not able to access or retrieve any data from the LG phone.

[74] For these reasons the prosecution had not satisfied the requirements of s. 90A. Therefore P81 was inadmissible notwithstanding that there was no objection for it to be marked as an exhibit when it was tendered as such during the trial: see *Ahmad Najib Aris v. PP* [2009] 2 CLJ 800.

[75] According to P17, the telephone numbers 0165257235 and 0165227235 were registered under the name of the accused person. PW17 said that at the material times the accused was using the Nokia phone (P68A) with the number 0165257235 and his girlfriend Huan Hui Chin was using the other Nokia phone (P78A) using the number 0165227235. PW17 referred to the several sms messages between these two numbers to establish that the accused had texted his girlfriend about the killing and the reasons for killing the deceased.

[76] Looking at lampiran A1 which was retrieved from the Nokia phone P68A, Hui Ting's phone numbers stored in this Nokia were +6738699736 and 0168563115. Similarly, looking at lampiran B2, the phone number 0165257235 stored in the Nokia phone P78A was under a name "Laogong' and not under 'Lee Kim Seng' or 'Kim Seng'. Therefore, the several exchanges of sms messages referred to by PW17 were purportedly between a Hui Chin and a 'Laogong' and not between the accused and Huan Hui Chin.

[77] The prosecution did not call Huan Hui Chin to testify that at the material times she was using the phone number 0165227235, that the accused was then using the phone number 0165257235, that the several sms messages were between her and the accused and that the person referred to as 'Laogong' and using the phone number 0165257235 to send her the messages was in fact the accused person. Instead, the prosecution offered her to the defence in the event the defence is called.

[78] This statement 'sms messages sent or received from the device' appeared at the top of p. 6/13 of lampiran A1. It also appeared on p. 8/9 of lampiran B2. Based on what PW11 had said to the court, the number +0165227235 shown at p. 6/13 of lampiran A1 referred to the telephone number of the receiver of this message. If that was true, similarly the number +60165257235 shown at p. 8/9 of lampiran B2 would also refer to the receiver of this message. If both telephone numbers were the receivers of the messages, who was the sender of these messages. Again, the prosecution did not clarify these discrepancies or messages.

[79] Further, looking at the sms messages highlighted by PW17 contained in P81, many of these messages were in a mixture of Mandarin, dialects or slangs. For examples, sms no. 6 at p. 6/13 of lampiran A1 with the message "She hai guo me many times.

A Think dao last time." and sms no. 2 at p. 7/13 of lampiran A1 with the message "Nien her neck". There was no translation or explanation what these messages meant. The messages in Mandarin, dialects or slangs were not admissible without any translation thereto. It would also not be safe for the court to
B guess at the meanings or significance of these messages and to come to a finding that these sms messages established that it was the accused who strangled the deceased to death and that the sms messages established his motive for killing the deceased.

C **[80]** With the evidence relied on by the prosecution referred to in paras. 13(a), (b), (c) and (d) above not being admissible, there was no evidence that it was the accused who strangled the deceased or was responsible for the death.

D **[81]** Where the prosecution's case is based on circumstantial evidence, motive is important in such cases to tilt the scale against the accused: *Lim Hean Chong v. PP* [2012] 2 CLJ 1046. With the contents of P81 being not admissible, there was no evidence of any motive on the part of the accused to kill the deceased.

E **[82]** There was no doubt that the accused knew where the deceased's body could be found and he led the police to the discovery of the body. That did not mean that he was responsible for the death of the deceased or that he had strangled the deceased to death.

F

[83] According to PW5 and PW10, the accused and the deceased were friends. On 24 March 2011, between 3pm to 4pm, they had gone to meet Lee Yunn Mei. There was no evidence what happened after that. There was no evidence whether the
G deceased was together with the accused after they met Lee Yunn Mei or whether they did meet Lee Yunn Mei. There was no evidence who was the last person who was with the deceased before she died. The prosecution did not call Lee Yunn Mei to testify about the meeting and whether after the meeting the
H accused left with the deceased or that the deceased left with Lee Yunn Mei or someone else. Again, instead, the prosecution offered Lee Yunn Mei as a witness to the defence.

[84] The DNA report (exh. P20) prepared by PW8 was *inter alia*
I in respect of the DNA analysis carried out on cotton swabs taken from the Toyota Vios usually used by the accused. It showed the presence of the accused's DNA and the deceased's DNA found

in the car. This would be consistent with PW5's evidence that the deceased had gone out with the accused to meet Lee Yunn Mei. The DNA report also showed the presence of DNA from unknown sources found in the car. Was there a third person present? There was no explanation by the prosecution. If the Toyota Vios was also used by other family members of the accused, then they could be the contributories of such DNA sources but there was no confirmation as such or otherwise. The evidence showed that there was no bloodstain from the deceased found in the car.

[85] The DNA report also showed that a mixed DNA profile was developed from the swab of the black plastic bag which was tied round the head of the deceased. The deceased was the major contributor to this DNA profile. The DNA profile of the minor contributor could not be developed to be positively identified. The accused's DNA was not found on this black plastic bag.

[86] The accused's DNA was not found on the deceased's body or on the clothes that she was wearing at the material times. The accused's DNA was also not found at the place where the deceased's body was found.

[87] The conduct of the accused on 25 March 2011 in purportedly telling his father he had done something wrong and in purportedly sending the sms messages on the incident to Huan Hui Chin raised a lot of suspicion that that he was or might be responsible for the death of the deceased. However his father had denied that the accused had made any admission that he caused the death of a female and the prosecution chose not to call Huan Hui Chin on the sms messages referred to. As stated above, the evidence relied on by the prosecution and set out in paras. 13(a), (b), (c) and (d) above has been ruled to be inadmissible. On the evidence before the court, there were too many gaps in the evidence presented by the prosecution. Although the accused knew and led the police to discover the body of the deceased, on the facts and circumstances of this case, the evidence presented before the court did not irresistibly point to one and only one conclusion ie, the guilt of the accused in causing the death of the deceased.

A **[88]** After subjecting the evidence adduced by the prosecution to a maximum evaluation, the prosecution has failed to make out a *prima facie* case against the accused on the charge against him. The accused is discharged and acquitted.

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